

9 Official Opinions of the Compliance Board 71 (2013)

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**Topic headings correspond to those in the Opinions Index at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>*

November 18, 2013

Re: University System of Maryland Board of Regents
Craig O'Donnell, Complainant

In two submissions that we have consolidated, Complainant alleges variously that the University System of Maryland Board of Regents (“USM Board”) and its committees have violated the provisions of the Open Meetings Act (the “Act”) that pertain to the issuance of meeting minutes and the closing of meetings.

We will address the allegations in summary fashion because we have discussed most of the applicable principles in other opinions about this Complainant’s allegations about this public body and its committees. The parts of this opinion that contain a finding that the USM Board violated the Act are subject to the amendments to the Act that took effect on October 1, 2013.¹

1. *Timely production and adoption of minutes.*

Complainant’s September 5 complaint asks us to find that the USM Board violated the Act because the minutes of the USM Board’s June 21 meeting were not ready for dissemination to Complainant until August 20. We addressed very similar allegations earlier this year, in 8 *OMCB Opinions* 180 (2013). We incorporate that opinion into this one, and note that, in any event, it appears from the USM Board’s website that it and its committees are adopting their minutes more quickly. We encourage the USM Board in that endeavor and do not find a violation in this instance.

Complainant’s September 6 complaint takes issue with the method by which some USM Board committees adopt their minutes. Further, the complaint states, minutes must reflect the date of adoption. Our authority extends only to alleged violations of the Act. The Act neither requires public bodies to take actions in meetings nor regulates a public body’s disclosures about actions taken by e-mail or other methods that do not involve the simultaneous interaction of a quorum of the public body. These allegations do not state violations of the Act.

2. *Level of detail in USM Board minutes regarding committees’ reports.*

Complainant’s September 6 complaint alleges that the USM Board’s minutes of its June 21 open session are deficient because they refer to committee reports without much detail about the contents of the reports. Specifically, Complainant refers to the USM Board’s approval of the Nominating Committee’s report on the election of officers and the USM Board’s receipt of the report of the Committee on Advancement about that committee’s adoption of meeting minutes by e-mail. Complainant cites 8

¹ For the procedures applicable to public bodies found in violation, see http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_ViolatorProcedures.pdf.

OMCB Opinions 122 (2012),² where we stated that a town council should have augmented its “sparse reference” to the council’s adoption of a budget amendment by either describing or attaching the amendment in question so that a person reading the minutes would understand the action taken. That matter involved a town council’s legislative action on a written amendment.

The Act requires minutes to “reflect” three pieces of information: the item considered, the action taken on each item, and each vote that was recorded. State Government Article (“SG”) § 10-509(b). Each item “must be described in sufficient detail so that a member of the public who reviews the minutes can gain an appreciation of the issue under discussion.” 6 *OMCB Opinions* 110, 113 (2009). Those principles do not apply when the public body’s consideration of an item is not subject to the Act. *See* 4 *OMCB Opinions* 67, 72 (2004) (finding no violation of the Act when the public body’s minutes provided little detail about an action that fell within the administrative function and thus beyond the scope of the Act). Further, nothing in the Act governs the content of what a committee must report to its parent public body.

Here, the first report, apparently written, pertained to the USM Board’s selection of its own officers, a task we have long considered to be an administrative function. *See* 9 *OMCB Opinions* 1, 9-10 (2013). The second report—a committee’s statement that it had adopted minutes—was apparently oral, and the minutes may in fact have reflected all of what was said. In any event, the USM Board’s oversight of the committee’s compliance with the Act was also administrative in nature. In light of the nature of these tasks, we conclude that the USM Board’s descriptions of these open-session discussions did not violate the Act.

3. *Level of detail in the June 21 open-session minutes about the vote to close that meeting.*

Complainant argues that the minutes of the June 21 meeting should have included more information about the USM Board’s vote to close that same meeting. Specifically, Complainant argues that the Act required the USM Board to repeat, in the minutes of that open session, the information that the presiding officer was required to provide on the written statement that was prepared for the vote to close that session.

Neither SG § 10-509, discussed above, nor SG § 10-508(d), which addresses closed-session disclosures, requires a public body to include all of the content of its written closing statement in the minutes of the meeting that was closed. Under the Act, public bodies are to provide in their written statements a level of detail not required of minutes and to make the written statements available for inspection immediately. *Compare* SG § 10-508(d)(2)(ii) (requiring presiding officer to prepare a written statement that lists the statutory authority for closing the session, the topics to be discussed, and the reasons for closing the meeting) *with* SG § 10-509(b) (as

² Our opinions are posted at <http://www.oag.state.md.us/Opengov/Openmeetings/board.htm>.

described in paragraph 2, above); *see also* 9 *OMCB Opinions* 46, 51 (2013) (addressing the requirement that the written statement be available when the public body decides to go into closed session). Members of the public thus are not deprived of the closing-statement information by the fact that the Act does not require the public body to repeat that information in the minutes of the preceding open session. Here, the USM Board had posted a preliminary closing statement³ with its agenda.

We do not find a violation as to this allegation. As we will discuss next, the rules are different for what a public body must include in the closed-session summary that the public body must include in the minutes of its next open session.

4. *Sufficiency of the summary, in the open-session minutes, of the events of closed sessions conducted during the prior meeting.*

Complainant alleges that the minutes posted by the USM as “Executive Session Minutes” do not meet the disclosure requirements set by SG § 10-509(c)(2). That section specifies four categories of information that, if “a public body meets in closed session, the minutes for its next open session shall include.” The USM Board did not include such a summary in the minutes of its next open session, which apparently occurred on August 30. Instead, the USM made many of the required disclosures earlier, in the Executive Session minutes that it adopted on August 20 along with the June 21 open session minutes.

We have no quarrel with the timeliness of the USM Board’s disclosures of the events of the closed session; we have never construed SG § 10-509(c)(2) to require a public body to delay disclosing the events of a closed session. However, the Executive Session minutes do not contain all of the information required by SG § 10-509(c)(2). We recognize that some of the required items are the same as those that the presiding officer had to provide on the written statement prepared before the closed session. However, SG § 10-509(c)(2) expressly requires a public body to include them also in the post-session summary, which is to appear in open-session minutes. *See* 1 *OMCB Opinions* 63, 65 (1994) (noting the Act’s requirement that the information “be in one place”). Such procedural violations might easily be avoided by adhering to the letter of SG § 10-509(c), which we reproduce in the footnote.⁴

³ Pre-prepared closing statements are necessarily preliminary, not only because an agenda might change during a meeting, but also because staff cannot be expected to predict precisely whether and why the members of a public body will perceive a reason to discuss a topic behind closed doors. For recommendations on how the presiding officer might address an unexpected request for a closed session, *see* 9 *OMCB Opinions* 46, 51 (2013).

⁴ SG § 10-509(c) requires:

If a public body meets in closed session, the written minutes for its next open session shall include:

The Executive Session minutes do properly include a listing of the topics discussed. The sufficiency of those disclosures varies. For example, the unadorned reference to “institutional strategic, budgetary and administrative matters” is so vague as to be insufficient. *See 9 OMCB Opinions* at 10 (discussing the same language in the USM Board’s earlier “executive session notes”). We encourage the USM to stop describing closed-session discussions in this broad and uninformative way. Even if some topics were administrative in nature, as might have been the case for certain subjects addressed by the college presidents, *see 4 OMCB Opinions* 28 (2004), the USM Board was required to describe them in a meaningful way in the closed-session summary. *See SG § 10-503(c)* (“If a public body recesses an open session to carry out an administrative function in a [closed session], the minutes for the public body’s next open meeting shall include . . . a phrase or sentence identifying the subject matter discussed”); *see also 7 OMCB Opinions* 208 (2011) (finding boilerplate descriptions insufficient). We will note several other deficiencies in the next section.

We find that the USM Board violated SG § 10-509(c)(2) in some regards. We encourage public bodies to view, and use, the post-meeting disclosures required by the Act as a mechanism for assuring the public that their closed sessions are legal.

5. *Whether the topics discussed by the USM Board in closed session fell within the statutory exceptions that it cited as a basis for excluding the public.*

Complainant questions whether the statutory exceptions cited by the USM Board applied to five of the many topics that the USM Board disclosed as topics of its closed-door discussions. We addressed some topics in *9 OMCB Opinions* 1 (2013), an opinion we issued in July to resolve a complaint by this Complainant about this public body, and we will refer the USM Board to that opinion. We will also address the sufficiency of some of the post-meeting disclosures.

First, the discussion about the sale of property exceeded the scope of the exception that allows a public body to close a meeting to “consider the acquisition of real property for a public purpose.” *See 9 OMCB Opinions* at 7.

Second, there is no exception for the catch-all topic of “institutional strategic [and] budgetary” matters. The USM Board might have received

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- (i) a statement of the time, place, and purpose of the closed session;
 - (ii) a record of the vote of each member as to closing the session;
 - (iii) a citation of the authority under this subtitle for closing the session; and
 - (iv) a listing of the topics of discussion, persons present, and each action taken during the session.

some of this information in the exercise of an administrative function; we do not know. *See 9 OMCB Opinions* at 10.

Third, the briefing on “two contracts under USM policy VII-10-0,” which is a policy for highly-compensated personnel, fell under the personnel exception, and perhaps as well within the administrative exception conclusion. For each topic that it intends to discuss in a closed session, the USM Board should first identify on its written closing statement the exception or exclusion claimed as authority for discussing that particular topic behind closed doors. Then, it should draft its post-meeting disclosures in terms that the general public can understand and that establish the applicability of the exception. Here, putting the word “employment” in front of “contracts” would have achieved both goals.

Fourth, we find that the approvals of memoranda of understanding (“MOUs”) with various unions fell within the exception for the consideration of matters that relate to collective bargaining negotiations. *See* SG § 10-508(a)(9). Complainant argues that the exception ceases to apply when “a contract has reached the point of approval,” because “the two sides have agreed negotiation is over.” The USM Board’s counsel, however, has confirmed to our staff that these negotiations are not actually over until the USM Board has approved the MOUs.⁵ Collective bargaining agreements, like procurements, are exceptions to the Act’s general rule that contract approvals must be conducted in public, and we conclude that the USM Board properly claimed the exception.

Fifth, there is no exception for a discussion about “naming rights,” and it was unclear which of the exceptions cited by the USM Board on its written statement pertained to this topic. The USM Board’s counsel informed our staff that the discussion pertained to two categories of potential names for facilities, and he identified the exception that the USM Board had deemed applicable to each.⁶ The first category was comprised of entities that seek naming rights, and the USM Board chooses those through a procurement-type process conducted for the naming of the facility in question. For that discussion, the USM Board cited the exception for discussions “directly related to a negotiating strategy or the contents of a bid or proposal.” SG § 10-508(a)(14). That exception applies “if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.” *Id.* We find that the discussion fell within the cited exception. However, the USM Board’s post-meeting disclosures neither linked the discussion to the

⁵ Counsel cited § 3-601 of the State Personnel and Pensions Article, which provides that, for State institutions of higher education, MOUs are not effective until ratified by the governing board. He also provided a policy that addresses the USM Board’s role during earlier stages of negotiations.

⁶ Because the USM Board and its committees publish a considerable amount of their meeting materials online, we did not require a response from the USM Board on most of the allegations. We did require information on the USM Board’s MOU and “naming rights” discussions, and counsel provided it.

claimed exception nor established, for the public, the applicability of that exception.

The second naming category is comprised of individuals' names that the USM Board chooses after discussing the personal attributes, public and private, of the potential honorees. For that discussion, counsel explained, the USM Board cited the exception that permits a public body to close a meeting to "protect the privacy or reputation of individuals with respect to a matter that is not related to public business." *See* SG § 10-508(a)(2). Again, we find that the exception applied but that the disclosure fell short of assuring the public of the legality of the closed session. First, as noted above, the closed-session summary should link the topic to the cited exception. And, while we can see that the USM Board would wish to discuss the personal and non-University related reputations of its potential honorees in a closed session in order to protect those individuals' privacy, we see little reason not to disclose the process itself.

We conclude that the USM Board violated the Act by exceeding the scope of the exception it claimed for the first topic (acquisition of real estate for a public purpose), reach no determination as to the second topic, and find that the Board did not violate the Act as to the other three topics. We also find that the closed-session summaries, though detailed in many regards, did not adequately apprise the public of the statutory authority applicable to the separate topics discussed. Most of the topics discussed by the Board were proper topics for closed sessions, and disclosures responsive to the applicable exceptions would have established that fact.

Conclusion

As stated above, we conclude that the USM Board violated the Act in some regards and complied with it in many others. For the most part, the violations had to do with the sufficiency of the USM Board's disclosures, which were sometimes couched in language that could probably be understood by the members and staff, but not by the public, but, in one instance, were so vague as to convey no information to the reader. Still, we commend the USM Board on the efforts it has made to comply with the Act over the last year and encourage it in that endeavor.

Open Meetings Compliance Board

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